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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY RAY LAMPKIN,

Defendant and Appellant.

F035404

(Super. Ct. No. 79241)

OPINION

APPEAL from a judgment of the Superior Court of Kern County, Robert T. Baca, Judge.

Curt R. Zimansky, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Louis M. Vasquez and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

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STATEMENT OF THE CASE

On September 1, 1998, a complaint was filed in the Bakersfield Municipal Court, charging appellant Johnny Ray Lampkin in counts I and II with felony violations of Penal Code¹ section 69, obstructing or resisting an executive officer in performance of his or her duties, and in count III, with a felony violation of Health and Safety Code section 11377, subdivision (a), possession of methamphetamine.

On October 20, 1998, after a preliminary hearing, appellant was held to answer on these charges. The information was filed in Kern County Superior Court on October 29, 1998, in case No. SC075442A.

On November 12, 1998, appellant filed a *Pitchess*² motion, seeking discovery of information contained within the personnel files of the officers involved in his arrest, concerning complaints made by citizens against those officers. The Bakersfield City Attorney's office opposed appellant's motion. On November 16, 1998, appellant also filed a motion to suppress evidence, pursuant to section 1538.5, contending his initial detention was unlawful. The People opposed appellant's suppression motion.

On December 1, 1998, the Honorable Lee P. Felice heard and denied appellant's suppression motion. Also on December 1, 1998, appellant's *Pitchess* motion was granted, in part, by Judge Felice.

On December 10, 1998, the Honorable Clarence Westra, Jr., granted the People's motion, under section 1385, to dismiss the information. It was stated in the minute order that the People intended to refile and, accordingly, appellant's bond was not exonerated but was to be applied toward the new filing.

¹ All further references are to the Penal Code unless otherwise indicated.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531

On January 29, 1999, a felony complaint, dated January 27, 1999, was filed in the Bakersfield Municipal Court, again charging appellant in counts I and II with felony violations of section 69, obstructing or resisting an executive officer in performance of his or her duties, and in count III with a felony violation of Health and Safety Code section 11378, possession of methamphetamine for sale.³

At the January 6, 2000, preliminary hearing, appellant was held to answer on all charges. On January 13, 2000, an information was filed in Kern County Superior Court, case No. SC079241A, charging appellant with four felony counts. Counts I and II charged appellant with violations of section 69, obstructing or resisting an executive officer in performance of his or her duties, count III charged a violation of Health and Safety Code section 11378, possession of methamphetamine for sale, and count IV charged a violation of Health and Safety Code section 11377, subdivision (a), possession of methamphetamine. On January 18, 2000, appellant was duly arraigned on the information and pled not guilty to all charges.

On January 20, 2000, appellant filed a motion to suppress evidence again premised upon a claim of unlawful detention. The People opposed appellant's motion. On January 21, 2000, appellant filed another *Pitchess* motion seeking discovery of information contained within the personnel files of the officers involved in his arrest, pertaining to complaints made by citizens against those officers. However, the *Pitchess* motion was later taken off calendar by appellant's trial counsel.⁴ On February 8, 2000, the Honorable Coleen W. Ryan denied appellant's motion to suppress evidence.

³ The clerk's transcript on appeal indicates the filing date for this complaint was on January 10, 2000, but this clearly is an error as the preliminary hearing was held on January 6, 2000.

⁴ The request to withdraw the motion indicates that the matter had been resolved. Additionally, appellant's supplemental request to augment and correct the record on

On March 8, 2000, a jury found appellant guilty of two counts of violating section 69 (counts I and II), and one count of violating Health and Safety Code section 11378 (count III) and not guilty of violating Health and Safety Code section 11377, subdivision (a) (count IV).

On April 5, 2000, appellant was sentenced to 16 months imprisonment on count III. The court imposed 16 months concurrent sentences on counts I and II. Appellant was also ordered to register pursuant to Health and Safety Code section 11590, upon his release from custody, as well as being ordered to pay various fines and penalties.

STATEMENT OF FACTS⁵

On August 28, 1998, plainclothes⁶ Bakersfield Police Officers Schieber and Anderson were checking on the status of Joanna Rayburn, a felony warrant suspect. Officers Schieber and Anderson had attempted to arrest Ms. Rayburn approximately two weeks earlier. On that prior occasion, the officers did not arrest Ms. Rayburn because she was under doctor's orders to remain in bed because she had hepatitis A. The officers arrived at Ms. Rayburn's residence in an unmarked⁷ city vehicle. When they arrived,

appeal and request for extension of time, filed on August 21, 2000, indicates the reason the motion was withdrawn was due to representations from the prosecutor that there was no new *Pitchess* information to disclose.

⁵ The facts set forth in the statement of facts pertain to our discussion and disposition in sections II and III, *infra*. In addressing appellant's claim that the trial court erroneously denied his motion to suppress, section I, *infra*, we limit consideration to the evidence presented at the hearing on the motion to suppress.

⁶ Both officers were dressed in suits and ties. Their Bakersfield Police Department badges were attached to the right front of their belts. Officer Schieber was also carrying a hand-held department issued radio.

⁷ The officers arrived in a tan Ford Crown Victoria, which had a red spotlight on the left, a clear spotlight on the right, four antennas on it, and a "cage" in the back seat for transporting prisoners.

they noted a 1991 red T-Top Camaro parked in front of Ms. Rayburn's residence. There were two individuals sitting in the Camaro, a female in the driver's seat and a male in the front passenger's seat.

Officers Schieber and Anderson exited their unmarked vehicle, and Officer Schieber approached the driver's door of the Camaro. Officer Schieber recognized Ms. Rayburn as the female in the driver's seat. Officer Schieber had a brief conversation with Ms. Rayburn, and then asked appellant for his ID. Appellant wanted to know why Officer Schieber wanted his identification. Officer Schieber responded indicating that appellant was seated with a felony warrant suspect and he wanted to know who appellant was. Appellant complied with Officer Schieber's request and presented his ID to Officer Anderson, who was now standing next to the passenger's door. Neither officer verbally identified themselves as police officers, nor did appellant ask them who they were. Officer Anderson contacted the Bakersfield Police Department, checking to see if appellant had any outstanding warrants for his arrest. Officer Anderson was advised that appellant did have an outstanding misdemeanor arrest warrant for section 485 (misappropriation of lost property). Officer Anderson advised Officer Schieber of the status of the warrant for appellant's arrest. Officer Schieber told appellant there was an outstanding misdemeanor warrant for his arrest, and told appellant he was under arrest. Officer Schieber, who was still standing next to the driver's door of the Camaro, told appellant to put his hands on top of his head. Appellant complied, and Officer Schieber walked around the front of the Camaro to the passenger's door.

As Officer Schieber opened the passenger door, appellant attempted to climb over Ms. Rayburn and out of the vehicle through the open T-Top on Ms. Rayburn's side of the vehicle. Officer Schieber attempted to grab onto appellant to prevent his escape from the vehicle. A brief struggle ensued between Officer Schieber and appellant, which resulted in both Officer Schieber and appellant falling back outside of the vehicle through the passenger side door, and onto a grass strip adjacent to the curb. The struggle continued

outside the vehicle, where Officer Schieber lost his grasp on appellant. Appellant got to his feet and ran toward the rear of the Camaro, where he met Officer Anderson who was coming to the aid of Officer Schieber. Officer Anderson attempted to tackle appellant. Appellant pushed Officer Anderson's arms away and then struck Officer Anderson at least twice in the chest. Appellant ran across the street chased by Officer Anderson. As appellant was running away, he fell forward onto the asphalt roadway. Officer Anderson ran up and attempted to gain control over appellant as he was lying on the asphalt, but was unable to keep him down on the asphalt. Appellant got up and continued running away with Officer Anderson in pursuit. Appellant and Officer Anderson eventually ended up next to a low cinderblock wall adjacent to the sidewalk, where their struggle continued. During the struggle with Officer Anderson appellant was yelling "I haven't done anything, I haven't done anything." Officer Anderson responded by telling appellant to submit to arrest. Officer Anderson also testified that at some point during their struggle, he "slugged [appellant] in the side."

Officer Schieber, who was still on the grass next to the Camaro catching his breath, saw Officer Anderson chasing appellant. Officer Schieber got to his feet and began running after appellant and Officer Anderson. As Officer Schieber came around the rear of the Camaro, he saw appellant and Officer Anderson struggling on the sidewalk across the street. Officer Schieber ran to where the two were struggling and kicked appellant in the groin. The blow bent appellant over, but he continued to struggle with Officer Anderson. Officer Schieber attempted to grab onto appellant in order to gain a control hold on appellant. As all three of them continued to struggle, they fell against the cinderblock wall. Officer Schieber struck the back of appellant's head several times with his radio. These blows did not have any immediate effect on appellant, and he continued struggling with the officers. Officer Schieber put his radio down, so he could use both hands in an attempt to gain control over appellant. At this point, Kern County Deputy Sheriff Fennell arrived at the scene to assist Officers Schieber and Anderson. As Deputy

Fennell ran over to assist Officers Schieber and Anderson, he saw appellant struggling with the officers near the wall. Appellant was kicking at the officers and trying to pull his left hand away from the officers while appellant's right hand was underneath appellant's body. Appellant also kicked at Deputy Fennell when he came within range. Deputy Fennell distracted appellant by slapping appellant twice on the right side of his face, which allowed Deputy Fennell to grab appellant's right hand.

With the assistance of Deputy Fennell, Officers Schieber and Anderson were able to gain control over appellant, force him to the ground, and handcuff appellant. As appellant was down on the ground being handcuffed, Deputy Sheriff Holland arrived to assist. Deputy Holland saw the officers trying to handcuff appellant and it appeared to Deputy Holland that appellant was kicking at the officers. By the time Deputy Holland got to their location, appellant was handcuffed and was no longer combative.

During the struggle, Officer Schieber received minor abrasions and cuts to the back of his hands, which he believed, were caused in the fall against the cinderblock wall. Because of the blows to appellant's head, administered by Officer Schieber, appellant required several staples to close wounds in his scalp.

After taking appellant into custody, Officer Schieber searched appellant, finding three small bundles in appellant's left front pocket. Each bundle contained a substance, which Officer Schieber believed to be methamphetamine. Two of the bundles were wrapped in toilet paper, while the third was wrapped in a paper towel. Each bundle contained the suspected methamphetamine within a plastic bag. Officer Anderson seized the three bundles and later booked them into evidence with the Bakersfield Police Department.

The contents of the three bundles, seized from appellant's pocket, were later analyzed by supervising criminalist David Diosi, of the Kern County District Attorney's Criminalistics Laboratory. Mr. Diosi weighed the contents of each bundle to determine the weight of the substances. The contents of the first bundle weighed 9.03 grams; the

second weighed 1.57 grams; and the third weighed 3.58 grams. Mr. Diosi testified that the contents of the three bundles tested positively for methamphetamine. Mr. Diosi also confirmed that each of the bundles contained a useable amount of methamphetamine. Detective Mark Charmley, a narcotics detective for the Bakersfield Police Department, provided testimony on the various means of packaging methamphetamine for sale. He also expressed his expert opinion that the manner in which the methamphetamine, seized from appellant, was packaged indicated it was packaged for sale.

Appellant, testifying in his own defense, claimed he did not know Officers Schieber or Anderson were police officers, they never identified themselves as police officers, and that he was unable to see their badges on their belts. Appellant said “I believed they wasn’t cops” Appellant thought Officers Schieber and Anderson were trying to steal his car. Appellant denied striking any of the officers, but admitted he was struggling to get away from them, as he did not know who they were. Appellant did admit that he “might have tried to push their hands off of me, and that is as far as that went.”

Appellant testified that he did not know how the methamphetamine came to be in the pocket of his shorts. He testified that he had been in the house with Ms. Rayburn for about four to five hours before his arrest. Appellant stated he and Ms. Rayburn had engaged in sexual intercourse, and during that time, his shorts were on the floor in the room with him. Appellant testified that at some point, while his shorts were off and still on the floor, he did go to the bathroom and that was the only time he was not present in the same room with his shorts. Appellant testified that he occasionally has Kleenex in his pockets for blowing his nose, but was unsure of whether he had put Kleenex in his pocket that day. Appellant denied knowing he had methamphetamine in his pocket.

The jury returned a verdict finding appellant guilty of two counts of felony resisting arrest (§ 69) and one count of possession of methamphetamine for sale (Health

& Saf. Code, § 11378), the jury found appellant not guilty of simple possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

DISCUSSION

I.

THE MOTION TO SUPPRESS

Appellant contends the trial court erred in not granting his motion to suppress. He argues that the officers illegally detained him as they had no warrant for his arrest nor reasonable suspicion or probable cause to detain him. Because of his illegal detention they obtained his identification, which the officers then used to discover an outstanding misdemeanor warrant for his arrest. Appellant contends that since his initial detention was illegal, the methamphetamine, seized during the subsequent search incident to his arrest, must be suppressed as the fruit of the poisonous tree. Alternatively, appellant contends, in the event we find his initial contact with the officers to be a consensual encounter, we must find the officers' use of his identification to check for outstanding warrants exceeded the scope of his consent in providing his identification to the officers.

Respondent counters appellant's argument asserting appellant's detention was reasonable in light of his companion's outstanding felony warrant, and that the officers' actions in using appellant's identification to check for outstanding warrants was reasonable. Respondent further challenges appellant's claim as to the scope of consent issue, arguing appellant's trial counsel did not present this issue to the trial court for resolution, and by inference, may not claim this new theory on appeal.

On February 8, 2000, before the Honorable Coleen Ryan, appellant's motion to suppress the methamphetamine seized during the search of his person was heard. Appellant's boilerplate suppression motion merely claimed the stop, detention and subsequent search of appellant were conducted without a warrant, putting the burden on the People to establish the arrest and search were therefore reasonable under the Fourth

Amendment. The only other issue raised by appellant's motion concerned the validity of the information received by the officers indicating the existence of the misdemeanor arrest warrant for appellant, i.e., *Harvey-Madden* (*People v. Harvey* (1958) 156 Cal.App.2d 516 and *People v. Madden* (1970) 2 Cal.3d 1017).

The People's opposition to appellant's suppression motion supported the officers' actions in obtaining appellant's identification under the theory that the encounter was consensual and did not amount to a detention, and that appellant's subsequent arrest was based upon a valid misdemeanor warrant, which in turn validated the subsequent search incident to arrest. The People's motion also contained a certified copy of the misdemeanor warrant for appellant's arrest.

Suppression hearing

The prosecutor's case in support of the arrest and search of appellant was presented through Officer Schieber's testimony. A certified copy of the misdemeanor warrant for appellant's arrest was also received into evidence, addressing the *Harvey-Madden* issue raised by appellant's written motion.

Officer Schieber and his partner, Officer Anderson, had arrived at Ms. Rayburn's residence to check on her status as they had a felony warrant for her arrest, which they had attempted to serve approximately two weeks earlier. They had not arrested her on the prior date because Ms. Rayburn had hepatitis A and was confined to bed. When the officers arrived at the residence, they parked behind a red Camaro, which was occupied by Ms. Rayburn and appellant. Officer Schieber had a brief conversation with Ms. Rayburn, and then asked appellant for his identification. Appellant asked why he needed to give Officer Schieber his identification. Officer Schieber stated he told appellant "he was seated with a felony warrant suspect and I wanted to know who he was." Neither Officer Schieber or Officer Anderson verbally identified themselves as police officers. Appellant provided his identification, and Officer Anderson, using the identification, checked appellant for outstanding warrants. Officer Anderson learned there was an

outstanding warrant for appellant's arrest, and advised Officer Schieber of that fact. Officer Schieber told appellant he was under arrest. The court foreclosed additional testimony concerning events occurring after the arrest of appellant, stating: "The issue is the initial detention, counsel. Go ahead and cross-examine, Mr. Gustein."

Under cross-examination, Officer Schieber testified that appellant had not done anything to arouse Officer Schieber's suspicion. Officer Schieber further indicated his request for appellant's identification was based upon his companion's felony warrant status. Officer Schieber also testified appellant would have been free to leave, had appellant chosen to do so, instead of providing his identification. From the time appellant provided his identification until the time he was advised he was under arrest took "a couple of minutes." Appellant did not testify at the suppression hearing.

At the conclusion of Officer Schieber's testimony, the parties submitted the matter to the trial court without argument. The court denied the motion without comment.

Analysis

The standard of review of section 1538.5 motions is set forth in *People v. Williams* (1988) 45 Cal.3d 1268 as follows:

"In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] 'The [trial] court's resolution of each of these inquiries is, of course, subject to appellate review.' [Citations.] [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, viz., the reasonableness of the challenged police conduct, is also subject to independent review. [Citations.] The reason is plain: 'it is "the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness."' [Citation.]" (*People v. Williams, supra*, 45 Cal.3d at p. 1301.)

In applying this standard to the present case, we conclude the trial court's denial of appellant's motion was proper.

Not every encounter between a citizen and law enforcement implicates the Fourth Amendment's prohibition against unreasonable searches or seizures.

“As the California Supreme Court explained in *In re James D.* (1987) 43 Cal.3d 903, there are three different categories or levels of police ‘contacts’ with individuals, ranging from the least to the most intrusive, for purposes of Fourth Amendment analysis. First, there are the ‘consensual encounters’ which result in no restraint of an individual’s liberty in any way and which may be initiated by police officers even without ‘objective justification.’ [Citation.] Second, there are detentions strictly limited in duration, scope and purpose which the police may undertake “‘if there is an articulable suspicion that a person has committed or is about to commit a crime.’” [Citations.] Third, there are seizures which exceed permissible limits of detention, that are comparable to an arrest, and are constitutionally permissible only if the police have probable cause to arrest the individual for a crime. [Citations.]” (*People v. Shields* (1988) 205 Cal.App.3d 1065, 1072.)

A consensual encounter occurs when a law enforcement officer, without reasonable suspicion to suspect criminal conduct is afoot, requests a citizen answer the officer's questions. As long as a reasonable person would feel free to leave, thus ignoring the officer's requests, the encounter is consensual. (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) It is well settled that an officer may approach a person in public and question them and even request identification. These encounters are consensual, and do not implicate the Fourth Amendment. (See *People v. Ross* (1990) 217 Cal.App.3d 879, disapproved on an unrelated ground in *People v. Walker* (1991) 54 Cal.3d 1013, 1022; *People v. Capps* (1989) 215 Cal.App.3d 1112; *People v. Lopez* (1989) 212 Cal.App.3d 289, cert. den. *Lopez v. California* (1990) 493 U.S. 1074.) Additionally, “in conducting a warrant check the officer does not ‘search’ at all in the constitutional sense . . .” (*People v. McGaughan* (1979) 25 Cal.3d 577, 582.)

In order to determine whether a particular encounter is consensual or rises to the level of a detention, we examine the conduct of the law enforcement officer, or officers, involved in the encounter. We look to see whether the officers' conduct possesses a coercive effect that would lead a reasonable person to conclude they were not free to leave. The officers' uncommunicated state of mind and the citizen's subjective belief are irrelevant to this determination. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.)

From a review of the evidence presented at the suppression hearing, we do not discern that the officers exhibited any type of coercive conduct that would have convinced a reasonable person they were not free to leave. Officer Schieber explained to appellant, when asked, why he wanted to see appellant's identification. The reason being that appellant was seated next to the subject of a felony arrest warrant. Appellant provided his identification, which was used to check for outstanding warrants. This whole procedure took "a couple of minutes." Officer Schieber clearly understood he had no probable cause to justify detaining appellant.

"[MR. GUSTEIN (appellant's trial counsel)]: In other words, had he not given you his identification and just opened the car door and started to walk away, would you have let him?

"[OFFICER SCHIEBER]: I would have to."

There was no testimony showing the officers drew their weapons, or that the officers commanded appellant to remain where he was. There is simply no evidence to support that this brief interaction between the officers and appellant was in any manner coercive.⁸ "[I]nterrogation relating to one's identity *or a request for identification* by the

⁸ At oral argument appellant's counsel opined that the words used by Officer Schieber, specifically his reference to appellant being seated next to a felony warrant suspect, would convey to a reasonable person they were not free to leave. Accepting appellant's argument we would have to conclude that appellant was therefore being detained and the relinquishment of his identification to Officer Anderson was not

police does not, by itself, constitute a Fourth Amendment seizure.” (*INS v. Delgado* (1984) 466 U.S. 210, 216, italics added.) Nor does a consensual encounter become a seizure because the officers do not advise the individual they are free to decline the officer’s requests. (*Ibid.*)

In *People v. Bouser* (1994) 26 Cal.App.4th 1280, the court held that an officer did not detain a defendant where the officer approached the defendant he had just observed in an alleyway known for drug trafficking. The officer parked his vehicle and walked up to the defendant, who was now walking away from the alley and the officer. The officer requested to speak with the defendant. The defendant stopped and allowed the officer to speak with him. Through their conversation the officer obtained the defendant’s name. Unbeknownst to the defendant, the officer radioed to check for outstanding warrants. The court found this entire encounter, including the check for outstanding warrants, was consensual and did not amount to a detention. In reaching the conclusion the check for warrants did not amount to a detention, the court cited several courts from other jurisdictions who had reached similar conclusions. The court, however, did find it significant that the defendant had not turned over anything to the officer to hold while the warrant check was being conducted, i.e., his identification. While this is a factor to be considered in the totality of the circumstances surrounding the encounter to determine whether it is or is not a consensual one, we do not feel compelled to conclude it is a dispositive factor. The *Bouser* court favorably cited a Fourth Circuit case, *U.S. v. Analla* (4th Cir. 1992) 975 F.2d 119, which involved facts similar to those present here.

Two officers responded to a call concerning a recent robbery-homicide, and approached the defendant who was using a public telephone. The officers requested his

consensual. We are not persuaded that this explanatory information transmogrified a consensual encounter into a detention.

identification and the registration for his vehicle, which was parked nearby. The defendant complied with their request and retrieved his license and registration from his vehicle. While the officers were checking for warrants, another officer arrived on the scene and advised the defendant that there had been a recent robbery-homicide and he matched the suspect's description. The third officer asked for the defendant's permission to search his car, and defendant consented. The search discovered evidence implicating defendant in the robbery-homicide. On appeal defendant challenged the search on the basis of an illegal detention and lack of his voluntary consent. The court upheld the search on the basis of his consent, finding there was no illegal detention, nor was there coercion to make his consent involuntary. In finding there was no illegal detention the court stated:

“Parker necessarily had to keep Analla's license and registration for a short time in order to check it with the dispatcher. However, he did not take the license into his squad car, but instead stood beside the car, near where Analla was standing, and used his walkie-talkie. Analla was free at this point to request that his license and registration be returned and to leave the scene.” (*U.S. v. Analla, supra*, 975 F.2d at p. 124.)

These factors are similar to the ones presented at the hearing on appellant's suppression motion. After obtaining appellant's identification, Officer Anderson checked for outstanding warrants. Appellant did not need to comply in the first instance by providing his license, he could have declined, and the officers would not have been able to justify detaining him. Appellant could also have requested, after Officer Anderson examined his identification, it be returned to him. As previously stated, the officers did not draw their weapons, they did not command appellant's compliance, they did not tell appellant he had to stay where he was. There are no factors to indicate that appellant's compliance with Officer Schieber's request to produce his identification was anything other than consensual.

In reviewing the totality of the circumstances, as presented at the suppression hearing, we do not view this brief encounter sufficient to rise to the level of a detention, and conclude the trial court correctly denied appellant's suppression motion, as this was a consensual encounter. (*Florida v. Bostick*, *supra*, 501 U.S. at p. 439.)

Scope of consent

Appellant argues that the officers use of his identification to run a check for outstanding warrants exceeded the scope of his consent in allowing the officer to see his identification. In other words, while he consented to showing Officer Anderson his identification, he did not consent to Officer Anderson using his identification to determine whether appellant was subject to arrest on an outstanding warrant.

We requested additional briefing from the parties on this issue, as it does not appear in the record that appellant had presented this issue below. If appellant failed to present this issue to the trial court it may not form the basis of review on appeal. (*People v. Auer* (1991) 1 Cal.App.4th 1664, 1670.)

Respondent contends that appellant did not preserve this issue for appeal. Appellant claims it was presented below, relying entirely upon the prosecution's opposition to appellant's motion to suppress to support his position. Appellant points out that the prosecution's opposition discussed the consent issue, and thus preserved the issue of the scope of that consent on appeal.

Appellant's claim would be more palatable had his trial counsel argued this specific issue before the trial court. The testimony established that there was no detention of appellant, and that appellant consented to providing Officer Anderson with his identification. From that point it was determined appellant was subject to arrest on the basis of an outstanding warrant. This in turn led to the search incident to that arrest and discovery of the contraband.

“Moreover, once the prosecution has offered a justification for a warrantless search or seizure, *defendants must present any arguments as to*

why that justification is inadequate. [Citation.] Otherwise, defendants would not meet their burden under section 1538.5 of specifying why the search or seizure without a warrant was ‘unreasonable.’ This specificity requirement does not place the burden of proof on defendants. [Citation.] As noted, the burden of raising an issue is distinct from the burden of proof. The prosecution retains the burden of proving that the warrantless search or seizure was reasonable under the circumstances. [Citation.] *But, if defendants detect a critical gap in the prosecution’s proof or a flaw in its legal analysis, they must object on that basis to admission of the evidence or risk forfeiting the issue on appeal.”* (*People v. Williams* (1999) 20 Cal.4th 119, 130, italics added.)

Appellant presented no oral argument whatsoever at the suppression hearing. The court was presented with evidence through Officer Schieber’s testimony, and by submission of a copy of the warrant for appellant’s arrest.

“Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal. ‘[T]he scope of issues upon review must be limited to those raised during argument This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party’s contentions.’” (*People v. Williams, supra*, 20 Cal.4th at p. 136.)

The issue of the scope of appellant’s consent was not before the trial court, the only notice given to the prosecution concerned the initial detention and the validity of the misdemeanor warrant for appellant’s arrest. Appellant failed to interject this contention during oral argument after the prosecution established there was no detention and the validity of the arrest warrant. Appellant may not now raise this new theory on appeal. (*People v. Williams, supra*, 20 Cal.4th at pp. 130-131)

II.

PENAL CODE SECTION 148, SUA SPONTE, INSTRUCTION

Appellant contends in connection with counts I and II that the court had a sua sponte duty to instruct the jury on the lesser included offense of resisting arrest (§ 148, subd. (a)(1)) and that the failure to so instruct requires reversal of appellant’s convictions

in those courts for felony resisting arrest (§ 69), as there was a reasonable probability that had the jury been so instructed appellant could have achieved a more favorable outcome.

Respondent counters, the court had no duty to give this instruction, as the evidence did not establish the lesser offense of section 148, subdivision (a)(1) had been committed. Respondent also contends, should this court find there was error, it was harmless.

The trial court instructed the jury on the crime of obstructing or resisting executive officers in the performance of their duties. (§ 69.) The specific instructions given, which are applicable to section 69, included CALJIC Nos. 1.20 [willfully defined]; 1.21 [knowingly defined]; 3.31.5 [mental state]; 7.50 [obstructing/resisting executive officer]; 9.23 [discharge or performance of duties defined]; 9.24 [lawful arrest by peace officer defined]; 9.25 [method of arrest]; 9.26 [arrest or detention, use of reasonable force duty to submit]; and 9.29 [performance of duties of officer, burden of proof]. Neither party requested and the court did not read the jury the instruction pertaining to the crime of section 148, subdivision (a)(1), resisting, delaying or obstructing an officer (CALJIC No. 16.102).

A trial court is required, sua sponte, to instruct the jury on lesser included offenses, “when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged.” (*People v. Seden* (1974) 10 Cal.3d 703, 715-716, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149.) The failure to instruct a jury on a lesser included offense, in the context of a noncapital case, is an error only under California law. (*People v. Breverman, supra*, 19 Cal.4th at p. 165.)

In order to determine whether a certain offense is a necessarily included offense, we examine both the statutory elements of the pertinent statutes as well as the language used in the accusatory pleading. (*People v. Birks* (1998) 19 Cal.4th 108, 117-118.) Here the accusatory pleading for count I alleged:

“On or about August 28, 1998, Johnny Ray Lampkin, did willfully and unlawfully attempt by means of threats or violence to deter or prevent BPD Officer Schieber, who was then and there an executive officer, from performing a duty imposed upon such officer by law, or did knowingly resist by the use of force or violence said executive officer in the performance of his/her duty in violation of Penal Code section 69, a felony.”

The identical language was used in count II, with Officer Anderson named as the officer against whom the offense was committed, and comports with the language of section 69. A violation of section 148, subdivision (a)(1), on the other hand, and in pertinent part states:

“Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment”

It is apparent that the elements necessary to establish a violation of section 69, would also necessarily establish all of the elements of a violation of section 148, subdivision (a)(1), which makes it a necessarily lesser included offense of section 69. (*People v. Esquibel* (1992) 3 Cal.App.4th 850, 854-855.) Having reached this conclusion, however, does not end our inquiry. A trial court is not under a duty to instruct on a lesser included offense unless there is substantial evidence which could lead a reasonable jury to conclude a defendant has in fact committed the lesser included offense rather than the greater. (*People v. Breverman, supra*, 19 Cal.4th at p. 162.)

In the event it is determined that the trial court did err in failing to instruct the jury on a lesser included offense, reversal is only required when the reviewing court “‘after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836; Cal. Const., art. VI, § 13; accord *People v. Blakeley* (2000) 23 Cal.4th 82, 93.)

Here both officers testified as to appellant’s conduct after he was advised of their intent to arrest him on the outstanding misdemeanor warrant. Officer Anderson testified

that appellant struck him at least twice during their struggle. There was also considerable testimony by both officers, and Deputy Fennel, that appellant was kicking at the officers throughout their efforts to take him into custody. Appellant testified he did not strike Officer Anderson, and he was not attempting to kick the officers, but was merely trying to get away from them, claiming he was unaware they were police officers and he thought they were trying to steal his car. Appellant admitted he “might have tried to push their hands off of me.” There was substantial evidence, had the jury believed appellant’s testimony, which could establish the lesser, rather than the greater, offense had been committed.

However, after reviewing the evidence, we are satisfied, that in spite of the trial court’s failure to instruct on the lesser included offense, appellant would not have achieved a more favorable result had the jury been so instructed. Thus for such reason, reversal is not required.

III.

EXCLUSION OF *PITCHESS* MATERIAL

Appellant contends the trial court erroneously granted the People’s motion in limine to exclude evidence from trial. The appellant sought to introduce evidence he had obtained, pursuant to a *Pitchess*⁹ motion, concerning a prior incident involving Officer Anderson. Appellant further requests this court review the in camera proceedings conducted during the *Pitchess* motion on December 1, 1998, to determine whether there was additional information appellant’s trial counsel should have received, but did not.¹⁰

⁹ The procedural rules for this motion are codified in Evidence Code sections 1043 through 1045.

¹⁰ We decline to review this aspect of the *Pitchess* proceedings for two reasons. First, appellant did not pursue his *Pitchess* motion in the case under appeal; instead, he relied upon the *Pitchess* information obtained in the prior dismissed proceedings.

Respondent counters that the trial court properly excluded the *Pitchess* evidence from trial.

Appellant argues that the proper standard of review on this question is under the *Watson* standard. (*People v. Watson, supra*, 46 Cal.2d 818 [reversal required when it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error], and Evidence Code section 354 [verdict will not be set aside unless reviewing court determines erroneous exclusion resulted in miscarriage of justice].)

Respondent contends it is our duty to review this question under the abuse of discretion standard.

Appellant's contention places the cart before the horse.

Evidence Code section 354 and *Watson* address the standard of review once it has been determined the trial court abused its discretion and erroneously excluded evidence. Before we will even consider appellant's standard of review, we must first decide whether the trial court abused its discretion in refusing to admit the *Pitchess* material into evidence. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 792-793.)

Procedural history

Appellant originally filed his *Pitchess* motion on November 12, 1998, seeking discovery of prior incidents involving Officer Schieber or Officer Anderson, wherein complaints were made that either officer had used excessive force, fabricated charges or evidence, committed acts of dishonesty or committed acts involving lax moral character. This motion was brought in the proceedings filed under Kern County Superior Court case No. SC075442A, which were subsequently dismissed on the People's motion on

Secondly, appellant did not seek any review of the original ruling which granted disclosure of information. (*City of San Diego v. Superior Court* (1981) 136 Cal.App.3d 236, 239.)

December 10, 1998. At the conclusion of the hearing on December 1, 1998, the Honorable Lee P. Felice granted appellant's *Pitchess* motion, requiring the disclosure of the names and addresses of complainants and witnesses concerning an incident involving Officer Anderson, which occurred on September 23, 1996.

After the case was refiled, and appellant was held to answer, appellant was arraigned on the felony information in Kern County Superior Court case No. SC079241A (the subject of this appeal). Appellant then filed another *Pitchess* motion seeking disclosure of the same type of information he sought in his earlier motion. Appellant later withdrew this motion.

Motion in limine to exclude *Pitchess* material

On March 6, 2000, appellant's jury trial commenced, beginning with motions in limine. Preliminarily, we note that the record on appeal does not contain a reporter's transcript for proceedings held in chambers on March 6, 2000, which presumably included, in part, the motion in limine to exclude introduction of testimony concerning the disclosed *Pitchess* incident of September 23, 1996, involving Officer Anderson. According to the reporter's affidavit filed with this court on August 3, 2000, those proceedings were not reported. Appellant did not seek a settled statement concerning those unreported proceedings, under California Rules of Court, rule 36(b). Consequently, our review is limited to the portions of the discussion concerning the exclusion of the *Pitchess* incident which do appear in the reporter's transcript of March 6, 2000.

In order for us to reach the merits of appellant's claim in this respect, it was incumbent upon appellant's trial counsel to make an offer of proof as to the relevancy or admissibility of the evidence appellant now claims was erroneously excluded. (*People v. Pride* (1992) 3 Cal.4th 195, 235 [claim that evidence was wrongly excluded cannot be raised on appeal absent an offer of proof in the trial court].)

The reported discussion involves only the prosecutor's and the court's comments on the issue the parties, including defense counsel, had been discussing in chambers.

“[THE COURT]: I have been discussing the matter with counsel in chambers, and Miss Marshall [prosecutor], do you want to indicate the first thing that we were discussing? It had to do with a Pitchess motion, right?”

Thereafter, the court recounted the substance of that discussion outlining the facts or circumstances surrounding a September 23, 1996, incident involving Officer Anderson. In substance, it involved Officer Anderson’s conduct, while off-duty, but in uniform, during an argument or altercation with a neighbor or a civilian, wherein he bumped the individual with his body. There was an investigation based upon the complaint, which resulted in a report indicating the officer had acted inappropriately.

From this we have determined appellant’s trial counsel apparently did make an offer of proof, although it was not reported nor was a settled statement obtained under California Rules of Court, rule 36(b). We shall therefore address the merits of appellant’s contention that the trial court erroneously excluded this evidence at trial.

The trial court pronounced its ruling on the record:

“All right. My ruling, of course, is that the Pitchess material against one of the officers will not be admitted. Evidence of that will not be admitted because it’s not the subject of excessive force used in the making of an arrest. As a matter of fact, the force there was not what would be called ‘excessive’ in any situation; it amounted to a little bump and no injury was inflicted, and it was not force used in making an arrest. It was inappropriate conduct for a police officer. It was not done in the performance of his duties, even. It was a private matter. I am ruling that it’s not relevant to this case, but I would also rule that if it were otherwise relevant I would rule on a 352 motion by the People -- and that has been made -- that the undue prejudice would outweigh the probative value, and so it will not be admitted.”

The court excluded the *Pitchess* material finding it was not relevant. The court also held it would exclude the evidence on Evidence Code section 352 grounds and that its prejudicial effect was not outweighed by the probative value. We therefore begin our discussion addressing the question of whether the proposed evidence was even relevant.

“‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or

disprove any disputed fact that is of consequence to the determination of the action.”
(Evid. Code, § 210.)

The proposed evidence could conceivably show that Officer Anderson has a tendency to act aggressively in confrontational situations. As such, this is a type of character evidence, could be admissible under Evidence Code section 1103, subdivision (a)(1), which states:

“(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

“(1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.”

Here the proffered evidence involved an incident wherein Officer Anderson, while off-duty, but in his uniform, “bumped” an individual during the course of an argument or altercation.¹¹ Because of this incident, Officer Anderson was apparently reprimanded for inappropriate conduct. It is obvious this was a serious enough incident to justify the police department’s finding that his conduct was inappropriate. We conclude the trial court erroneously excluded this evidence on the grounds it was not relevant. This in turn raises the question of the other proffered basis for exclusion -- the probative value of the evidence was outweighed by its prejudicial impact.

“Although we recognize that the prosecution is accorded protection under Evidence Code section 352, similar to that of the defense, from the use of prejudicial evidence with little probative value, the purported prejudice to the prosecution cannot be based on mere speculation and

¹¹ Contrary to appellant’s characterization of this incident in his reply brief, we find no offer of proof presented to the trial court showing that Officer Anderson “used his authority to intimidate a juvenile by threatening to put him in jail” as part of this incident.

conjecture. [Citation.] Moreover, ‘Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it.’ [Citation.]” (*People v. Wright* (1985) 39 Cal.3d 576, 585.)

Here appellant’s main contention was that he was lawfully resisting the use of excessive force, and thus, if the jury believed his theory, he could not be found guilty of violating section 69. However, appellant was not allowed to present his evidence of Officer Anderson’s prior “inappropriate behavior” to the jury for its consideration.

The court was required to weigh the probative value of this evidence against its prejudicial impact. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) Prejudice, as used in Evidence Code section 352, refers to evidence which will evoke an emotional bias against a party. (*People v. Garceau* (1993) 6 Cal.4th 140, 178.) In this regard, the court examined the probative value of the bumping incident, finding it of minimal value compared to the potential of evoking an emotional bias against Officer Anderson. The court, on this basis, precluded appellant from offering this evidence to attack the credibility of Officer Anderson. Assuming, for the sake of argument, the trial court abused its discretion, we conclude there was no miscarriage of justice requiring reversal of appellant’s conviction. (Evid. Code, § 354.) That is to say, it is not reasonably probable the jury would have reached a different verdict had the court allowed in this evidence. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

“As a general matter, the ‘[a]pplication of the ordinary rules of evidence ... does not impermissibly infringe on a defendant’s right to present a defense.’ [Citations.] Although completely excluding evidence of an accused’s defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused’s due process right to present a defense. [Citation.] If the trial court misstepped, ‘[t]he trial court’s ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.’ [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension

(*Chapman v. California* (1967) 386 U.S. 18, 24).” (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Appellant’s principle theory of defense, to the section 69 charges, was that he did not know Officers Schieber and Anderson were police officers. The jury was instructed that in order to find appellant guilty, appellant had to know they were police officers. In addition, appellant relied upon a person’s lawful right to use reasonable force to defend themselves against the use of excessive force. The jury was instructed on this issue as well.

The exclusion of the defense evidence concerning Officer Anderson’s inappropriate behavior on a prior occasion did not deprive appellant of a defense. After a review of the entire record we conclude it is not reasonably probable that had the jury been allowed to hear evidence on that incident, it would have reached a different verdict.

DISPOSITION

The judgment is affirmed.

Harris, J.

WE CONCUR:

Ardaiz, P.J.

Buckley, J.